Fayette Electrical Cooperative, Inc. ***and*** **International Brotherhood of Electrical Workers, AFL–CIO, Local Union No. 66, Petitioner.** Case 16–RC–9710

March 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

On June 16, 1994, the Regional Director for Region 16 transferred this case to the National Labor Relations Board, pursuant to 29 C.F.R. § 102.67(h) as it raises important questions appropriate for decision in the first instance by the Board. The Employer and the Petitioner have each filed briefs.

The Board has delegated its authority in this proceeding to a three-member panel.

Based on a careful review of the briefs and the record, the Board finds that the Employer is engaged in commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction.

Background

The Employer is a nonprofit electrical distribution cooperative incorporated in the State of Texas pursuant to the Texas Electrical Cooperative Act (TECA), which provides for the incorporation of nonprofit cooperatives to furnish electricity to members in rural areas. Annually the Employer generates in excess of $250,000 in gross business revenues from the operations described above.

The Employer provides electrical service to portions of eight rural counties, and is the sole provider of electricity within its operating area. Any individual, corporation, or other entity desiring electrical service may apply for membership in the cooperative, and by law only those persons receiving electrical service from the cooperative may be members of that cooperative.

The Employer's service area is divided into seven districts, and the Employer is governed by a board of directors comprised of one director from each of the seven districts and elected by its members at its annual meeting of the members. Pursuant to the Employer's bylaws, the directors serve staggered 3-year terms. Directors are elected by the entire membership, with each member having one vote. The Employer's bylaws do not permit voting by proxy, although TECA permits proxy voting. The bylaws also specify a procedure for the removal of directors by a vote of the membership (by law, 10 percent of the membership may petition for the calling of a special meeting).

On September 30, 1992, the Board dismissed a petition filed by International Brotherhood of Electrical Workers, AFL–CIO, Local 2079, based on its finding that the Employer was exempt from the Board's jurisdiction pursuant to Section 2(2) as a political subdivision. *Fayette Electrical Cooperative*, 308 NLRB 1071 (1992) (*Fayette I*). In reaching this determination, the Board relied on the following factors: the Employer's board of directors are elected by the ''entire electorate'' in its service area; the directors may be removed during their term of office by the membership; membership in the Employer is ''coextensive with residency in the geographic area served, such that there are no persons residing in the Employer's service area who are not members of the Employer''; the Employer is exempt from state sales tax and Federal excise and income taxes; the Employer is closely regulated by state and Federal agencies and has a certificate of convenience and necessity from the Texas Public Utility Commission (PUC); and the Employer's meetings and most of its financial records are open to the public.

The instant petition was filed by the Petitioner on May 2, 1994. The Regional Director for Region 16 denied the Employer's motion to dismiss the petition on grounds of res judicata, collateral estoppel, and stare decisis, and a hearing was held on the petition on May 24, 1994. At that hearing, the Petitioner presented undisputed evidence concerning the nature of the Employer's operations that had not been presented to the Board in connection with the earlier petition. Thus, the Employer's general manager, Nietche, testified that voting membership in the Employer is per electric meter, not per person. Nietche explained, in this regard, that households with one meter have one vote, while multimeter households have multiple votes, in both cases regardless of the number of individuals actually residing at the respective addresses.[1] Further, businesses, churches, and other entities with electric service also have one membership per meter, as do any nonresident individuals who own property in the Employer's service area and have a meter or meters.

In its 1992 decision, the Board found that the Employer was exempt from Federal income and excise taxes and Texas sales taxes. Undisputed evidence presented at the 1994 hearing confirmed these facts. Additional undisputed testimony revealed that the Employer's exemptions from Federal income and excise taxes and Texas franchise and sales taxes are based on its status as a nonprofit corporation, pursuant to provisions of Federal and Texas law which similarly exempt other nonprofit entities (including hospitals, educational institutions, and other similar entities) from

[1] At the first hearing, Nietche testified as follows:

Q. Are there any persons within your service area which are not members of the cooperative?

A. No, ma'am.

Q. Therefore, is membership virtually coextensive with citizenship in your area?

A. Yes, ma'am.

such taxes.[2] Further, evidence presented at the hearing revealed that the Texas attorney general has issued an official opinion that the Employer is not a political subdivision of the State of Texas and is subject to state property taxes. See Texas Op. Atty. Gen. O–587 (Tex. 1939).

With respect to the Employer's regulation by the PUC cited by the Board in its 1992 decision, the 1994 record reveals that this regulation is identical to that imposed by Texas on investor-owned utilities over which the Board regularly asserts jurisdiction. The Board's 1992 decision also noted the Employer's relationship to the Federal Rural Electrical Administration (REA); the 1994 record reveals, however, that, although the Employer is subject to certain operating and accounting restrictions imposed by the REA because it has borrowed money from the REA, once the loans are repaid the REA's authority over the Employer ends.

Contentions of the Parties

The Employer asserts that the Board should dismiss this petition based on its prior determination that it is a political subdivision as there is no claim of changed circumstances since that decision and principles of collateral estoppel and res judicata preclude relitigation of its exempt status under these circumstances. Further, the Employer contends that the evidence presented in the 1994 hearing does not detract from the validity of the Board's holding in *Fayette I* that it is a political subdivision. Finally, the Employer claims that, even if it is not found to be an exempt political subdivision, its relationship to the REA and the Texas PUC preclude meaningful bargaining.[3]

The Petitioner contends that the Board should reconsider its 1992 determination in *Fayette I* and assert jurisdiction over the Employer. In this regard, the Petitioner contends that the record in the prior proceeding was incomplete and inaccurate in several material respects, as demonstrated by the additional undisputed facts adduced at the 1994 hearing and set forth above. The Petitioner also contends that the Employer is not precluded by its relationship with state or Federal agencies from engaging in meaningful collective bargaining.

Discussion

Initially, the Employer contends that the Board should not consider the facts presented in the 1994 hearing, but should instead dismiss the petition on the basis of its 1992 decision finding that the Employer is an exempt political subdivision. We disagree. Even assuming arguendo that the Board's jurisdictional determinations are subject to principles of res judicata and collateral estoppel, as the Employer contends, we find that this case falls with the well-recognized exceptions to the rules of issue preclusion.

In general, the principle of collateral estoppel provides that, ''[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'' Restatement 2d, *Judgments* § 27.[4] However, certain exceptions to this rule also are recognized. Thus, it is generally accepted that relitigation is permitted when

> [t]he issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to void inequitable administration of the laws; or
>
> . . . .
>
> [t]here is a clear and convincing need for a new determination of the issue[ ] because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action. . . .

Restatement 2d, *Judgments* § 28 (2), (5).

We find these exceptions applicable to the proceedings before us. First, the applicable legal context has changed since 1992 with the intervening issuance of the Board's decision in *Concordia Electric Cooperative*, 315 NLRB 752 (1994) (asserting jurisdiction over electrical cooperative and rejecting claim that cooperative was political subdivision). Indeed, *Concordia* expressly overrules certain aspects of the Board's holding in *Fayette I* which, as discussed more fully below, bear directly on the Employer's claimed exempt political subdivision status.

Second, we find a compelling need to permit relitigation of the Employer's exempt status because of the potential impact of an erroneous determination on the public interest and on third parties. A necessary consequence of the Board's finding in *Fayette I* that the Employer is exempt from the Board's jurisdiction is that its employees are not entitled to the protections of the Act. To the extent that that determination was erroneous, the employees could be deterred from engaging in protected, concerted activities even though

[2] See 26 U.S.C. § 501(c)(12) (mutual and cooperative associations exempt from Federal income and excise taxes); Texas Tax Code §§ 171.052–171.086 (franchise tax exemptions); Texas Tax Code §§ 151–305–320 (sales tax exemptions).

[3] The Board found it unnecessary to pass on this issue in *Fayette I* as it dismissed the petition on other grounds.

[4] We note, in this regard, that the petitioner in the 1992 case was International Brotherhood of Electrical Workers, AFL–CIO, Local 2079, while the Petitioner here is IBEW Local 66. The Petitioner does not argue that principles of issue preclusion are not applicable on the ground that a different party was involved in the first adjudication; however, and we find it unnecessary to pass on this issue in light of our finding above.

they were not parties to the prior case. Thus, individuals falling under the statutory definition of an employee would be denied fundamental statutory rights. This outcome is inimical to the Act's purposes and policies. It would be contrary to the public interest, and unfair to the Employer's employees, to delay reconsideration of the Employer's jurisdictional status under these circumstances until the issue is presented by a litigant that was not a party to the prior case. Accordingly, we find that established principles of issue preclusion do not bar relitigation of the Employer's status under the Act.

Turning to the merits of this case, we find that the Employer, like the electrical cooperative in *Concordia*, is not a political subdivision of the State of Texas and is subject to the Board's jurisdiction. Section 2(2) of the Act exempts from the Board's jurisdiction, inter alia, ''any State or political subdivision *thereof*'' (emphasis added). As noted in *Fayette I*, the Supreme Court stated in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), that for an entity to be exempt from the Board's jurisdiction as a political subdivision, it must either: (1) have been created directly by a State, so as to constitute an arm or department of the Government; or (2) be administered by individuals who are responsible to public officials or to the general electorate. There is no evidence or contention in this case that the Employer was created directly by the government of the State of Texas or that its board of directors is responsible to any public official of the State.[5] Thus, we must determine whether the Employer is administered by officials who are responsible to the general electorate. After careful review, we find, on the basis of the record developed in this proceeding and contrary to our prior decision, that the Employer's officials are not responsible to the general electorate of the State of Texas, and we therefore find that it is not exempt from the Board's jurisdiction as a political subdivision. Our reasons follow.

As discussed above, the Employer now concedes that its membership is **not** coextensive with residency in the geographic area which it serves; to the contrary, some individuals residing in the service area are not members of the Employer, while the Employer admits to membership corporations and other similar entities which are not qualified to serve as electors in state or Federal elections.[6] In *Concordia*, the Board explained that an entity will be found to be '''responsible to the general electorate' only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular political control.'' *Concordia*, supra. The Board further found that that employer's inclusion in its membership of entities that are not eligible voters in state elections, together with its failure to extend membership to all voting age residents qualified to serve as electors, precluded its exemption as a political subdivision under Section 2(2) of the Act. Id., slip op. at 4. Accordingly, for the reasons expressed in our decision in *Concordia*, we find that the Employer is not ''responsible to the general electorate'' within the meaning of the political subdivision test set forth in *Hawkins County*.[7]

In *Fayette I*, the Board found the Employer's exemption from certain state and Federal taxes and its regulation by the state public service commission and the REA further supported the Board's finding that the Employer was a political subdivision. As noted above, however, the record in this proceeding establishes that the Employer's tax and regulatory status is based on its status as an electrical cooperative, and is indistinguishable from the treatment afforded other employers indisputably subject to the Board's jurisdiction, and is in any event not based on any determination by any other body that the Employer is a political subdivision of the State of Texas.[8] In *Concordia*, the Board subsequently reconsidered this aspect of its holding in *Fayette I* and concluded that these factors did not support a finding of exempt political subdivision status, overruling *Fayette I* to the extent that it was inconsistent with that determination. As the Board there explained, it would be anomalous to find that these factors establish exempt status when nonexempt entities are subject to the same requirements and provisions of state and Federal law. Accordingly, as in *Concordia*, we find that the Employer's tax and regulatory status do not support, and indeed tend to negate, the Employer's claim that it is a political subdivision.

[5] This was the issue before the Court in *Hawkins County*. Thus, the Court did not consider what factors determine whether an electric cooperative or other entity is ''responsible . . . to the general electorate.''

[6] The Employer also admits to membership individuals who do not reside for voting purposes within its geographical service area, as long as they receive electric service from the Employer.

[7] We note that the Employer's membership is even less comparable to the ''electorate for general political elections'' than was the case in *Concordia*, in that the Employer allows individuals with more than one electric meter to have additional memberships for each meter, and hence to cast multiple votes in elections for directors. We find that this fact further establishes the Employer's nonexempt character.

As in *Concordia*, the Employer's service area does not correspond to any legislatively established boundaries. In light of our finding above, we find it unnecessary to pass on this factor in deciding this case.

[8] To the contrary, the Texas attorney general has opined that the Employer is not a subdivision of the State. See Texas Op. Atty Gen. O–587 (Tex. 1939). For the reasons stated in *Concordia*, we may appropriately take these state findings into account in finding that the Board has jurisdiction in this case. See *Concordia*, supra.

Finally, we find no merit to the Employer's contention that it is exempt from the Board's jurisdiction under *Res-Care*, 280 NLRB 670 (1986), and its progeny. In *Res-Care*, the Board found that it would not effectuate the purposes of the Act to assert jurisdiction over an employer that lacks the final say over basic subjects of bargaining because of the control exerted over these basic subjects of bargaining by a public body. Contrary to the Employer, we find that its relationship with the REA and the Texas PUC do not deprive it of ''the ultimate authority to determine primary terms and conditions of employment, such as wages and benefit levels . . . .'' Id. at 674. With respect to the REA, the Board has previously recognized that ''REA is not a regulatory agency and is not involved in the day-to-day operations and management of its borrowers. REA only exercises general oversight of its borrowers in matters pertaining to the Government's security interests as long as the loans remain outstanding.'' *Concordia*, supra (footnote and citation omitted). See also *City of Paris v. Federal Power Commission*, 399 F.2d 983, 986 (D.C. Cir. 1968) (electrical cooperatives are ''private nonprofit corporations organized for the benefit of their consumer-owners. They are neither operated nor controlled by any government, Federal, state, or local.''). There is no evidence that REA sets or controls wage or benefit levels; rather, its authority over the Employer is similar to that typically exercised by lenders over borrowers; a form of control without relevance to the Board's statutory jurisdiction. *Concordia*, supra.

Likewise, we perceive no evidence that the PUC's regulatory authority over the Employer precludes meaningful bargaining. The Employer asserts that the PUC has the authority to set the maximum rates it may charge its member/customers and that it has established safety standards for the operation of the Employer's equipment. However, the fact that the Employer may be subject to PUC-imposed requirements in this regard does not preclude it from bargaining over terms and conditions of employment. There is no evidence that the PUC sets wage rates for employees of cooperatives; at most, its rate-setting authority may indirectly affect the Employer's willingness to agree to wages in excess of levels used by the PUC in setting the Employer's rate base. But all regulated utilities are subject to such constraints, including investor-owned utilities over which the Board has routinely exercised jurisdiction. Similarly, the Board has never found that an employer is precluded from engaging in meaningful bargaining merely because it is subject to governmental safety standards.

Conclusion

The Employer, an electrical cooperative, annually derives gross income in excess of $250,000 from the distribution and sale of electrical energy to its member/customers. For the reasons set forth above, we find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it would effectuate the purposes of the Act to assert jurisdiction.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 16 for further processing consistent with this decision.